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ABSTRACT

The possibility that judges' expectancy effects may adversely affect the results of jury trials is a problem that needs careful theoretical analysis and innovative methods of resolution. Traditional efforts by the legal community to counteract the threat of verbal/nonverbal bias by judges include the "Code of Judicial Conduct," curative instructions (admonishments to the jury following certain courtroom behaviors), and mistrials or motions for mistrials. Unfortunately, these methods are not based on any theoretical scheme, do not always eliminate judge expectancy effects, and sometimes even promote expectancy effects. A theoretical explanation of expectancy effects in the courtroom has been offered that is based on six factors emanating from experimenter-expectancy literature. These factors can be viewed either as a series of hypotheses to be tested or as a form or proof in and of themselves. They can be applied to judges' courtroom behaviors to test for expectancy effects, leading to the formation of rules that will eliminate expectancy effects from the courtroom. Some of the proposals to reduce judge expectancy effects are the use of process instruction, juror training/orientation, and modifying/codifying the methods for giving final instructions to juries. (RL)

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"Ain't Misbehavin'": Bench Conduct and Nonverbal Expectancy Effects in Criminal Jury Trials

A paper presented at the annual meeting of the Eastern Communication Association, Ocean City, Maryland, April, 1980.

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Introduction

The Constitution of these United States guarantees the right to due process of law and an impartial jury in all criminal prosecutions.[1] An impartial jury has come to mean one that is independent from the biases of the bench. The historical view of the jury as a buffer between the judiciary and the people survives even in modern times. Justice White, in delivering the opinion of the United States Supreme Court in Duncan v. Louisiana explained the justification for an independent jury in this way:

> Those who wrote our constitutions knew from history and experience that it was necessary to protect against unfounded criminal charges brought to eliminate enemies and against judges too responsive to the voice of higher authority. . . . Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor, and against the compliant, biased, or eccentric judge.[2]

The relationship between judge and jury is a delicate one. The judge must run the trial and instruct the jury on the law, yet the judge must not control the decisions of the jury. However, the legal community has long suspected that an expectancy effect threatens the independence of the jury. Judge Weinstein wrote in his famous commentaries on evidence that:

> It is, of course difficult to avoid giving the jurors some impression of the way the court feels about the case, even if the court conscientiously tries to avoid communicating that opinion. . . .
>
> As all practicing members of the bar are fully aware, inflections in the voice of the judge, the way he gestures, the points at which he smiles or frowns can reveal to the jury his opinions on the evidence as surely as if they are articulated verbally.[3]

Despite the general recognition that a problem exists, the legal community has not been able to effectively deal with the problem in a comprehensive way. Two factors have thwarted the efforts of the legal community. First, no major attempt has been made to develop a theoretical explanation of judge expectancy effects. Attempts to remedy the problem have been based on pure conjecture. Secondly, the legal machinery used for correcting bias is based on a verbal model whereas expectancy effects are primarily the result of nonverbal communication.

In this paper a theoretical explanation of judge expectancy, based on experimenter expectancy research, will be presented followed by a critique of present legal remedies. Finally, several remedies will be suggested to reduce the possibility of judge expectancy effects.

A Theoretical Explanation of Judge Expectancy Effects

The legal community has not exerted a determined effort to develop a theoretical explanation of judge expectancy effects. In recent years only one article, a 1975 note in the Virginia Law Review, has addressed the subject in legal journals.[4]

In this paper an attempt will be made to develop a theoretical model of judge expectancy by means of an analogy to experimenter expectancy research. Although the Virginia Law Review note broke new ground when it suggested

that the relationship of judge and jury was similar to the relationship of experimenter and subject in social science experiments, it suffered from an incomplete literature review and was necessarily not able to report on post-1975 research. Nonetheless, an analogy between the psychology experiment and the jury trial seems to be the most promising approach to the problem.

In psychology experiments researchers feared that some of their nonverbal actions were biasing the results. A number of experiments were designed to test the notion. The experiments showed that experimenters, in some situations, did influence the decisions of experiment subjects. The influence was found to occur mainly through subtle nonverbal communication.

The jury trial and the experimenter expectancy experiment are alike in all essential respects. Although there are some differences, they are not of such an essential character that they rob the analogy of utility.

There are some aspects of the jury trial which are much different from the experimenter expectancy experiment. Although these differences must be considered when explanations of the judge/jury relationship are drawn from the analogy, they do not sap the analogy of probative force.

The first major difference between the psychology experiment and the jury trial is the advocacy process. The use of argument by attorneys might, in an effort to persuade, make the issues

of the case very clear. A review of expectancy literature seems to indicate that the less ambigous the task, the less expectancy effects occur.[5] Thus, argument may decrease expectancy effects. Many cases might not pose any problems of ambiguity, but in others the testimony of a witness might be confusing or contradictory even after extensive argumentation. The jury, then, unaided by the advocacy of the attorneys, must make a decision in an ambiguous situation.

Even if the advocates are successful in clearing up the issues during the witness testimony and final arguments, the charge may be so ambiguous as to invite expectancy effects. In Texas, a judge read a charge to a jury and said: "I bet I have read that a hundred times and I still don't know what it means, but it's a statute so I cherish it."[6] All statutes and charges may not be that confusing, but when they are, the judge might produce an expectancy effect merely by his nonverbal actions while reading the charge. Once the charge is read, the advocates no longer have any major effect on the proceedings, and hence, no major influence in diminishing expectancy effects.

The second major difference between the experimenter expectancy experiment and the jury trial is the deliberations of the jurors. In the experimenter expectancy experiment, subjects made decisions on their own. In the jury system, jurors make their decisions on the basis of a discussion process. Little is known about the deliberations of actual jurors, since to

invade their deliberations would violate the defendant's due process rights. A number of studies have shown that the deliberations of simulated jurors tend to reduce the effects of other types of bias.[7] Experimenter expectancy bias probably does not work in the same way. In the jury experiments, mentioned above, the source of the bias was fairly obvious (race, attractiveness, occupation, etc.), but expectancy bias is difficult to separate from the issues involved at trial. Indeed, the expectancy is likely to be one of interpretations of the issues. Thus, it would be most difficult for the jurors to separate expectancy bias, even if they were aware of it, from the issues that they must decide upon. Other types of bias could be dismissed as not important in the consideration of the issues, but expectancy effects are subtly mixed with the substative issues of the trial.

The final difference between the experimenter expectancy experiment and the jury trial is the presence of other people in the courtroom. These people might include the bailiff, spectators, the court reporter, and so forth. Since these people do not often have high profile roles in the trial, it is doubtful that they have any effect. A review of the experimenter expectancy literature revealed that in order to communicate any great expectancy effects, both auditory and visual channels had to be used.[8] Since these people rarely have speaking roles in the trial, it is unlikely that these people would produce any expectancy effects of their own.

The relationship of court personnel and jurors is carefully regulated when the trial is not in progress. A number of cases have been reversed because of statements made to jurors by bailiffs.[9]

The experimenter expectancy experiments and the jury trial are similar in a number of ways. The roles of the judge/experimenter and juror/subject are similar in the trial and the experimenter expectancy experiment. The strength of the analogy comes from the similarity of those roles.

In the experimenter expectancy experiment and the jury trial the jurors and the subjects are similar in a number of respects. First, the jurors and the experimental subjects are required to make judgments, using criteria which are supplied externally, and are generally not given any tangible rewards for their performance. Secondly, both the jurors and the subjects do not normally participate in their respective roles as jurors or subjects. The task that both jurors and subjects are required to perform is a temporary, and to some degree, a novel activity. Finally, both the jurors and subjects are selected from a random pool. It is true that jurors are usually selected from voter lists and must survive voir dire, and that experimenter expectancy experiment subjects are usually selected from introductory psychology classes, but they still represent a group of people who are thrust together, without generally any experience at doing the task which will be asked of them.

In the trial, the role of the judge is similar to the role of the experimenter in the experimenter expectancy experiments. First, it is the duty of the experimenter to run the experiment, just as it is the duty of the judge to run the trial. Secondly, it is the duty of both the experimenter and the judge to instruct the subjects and jurors. In the experimenter expectancy experiment the experimenter instructs the subjects as to what they are looking for and what decisions need to be made. In the trial, the judge charges the jury, telling them what they must look for under the law.

Finally, the task of subjects in the experimenter expectancy experiment is similar to the task required of the jurors in the trial. In the experimenter expectancy experiment, the subjects are usually required to estimate the success of a person on the basis of a photo. In the trial, jurors are required to decide whether or not a certain person is telling the truth, whether the person is a good observer, or perhaps whether the person's actions fit the legal criteria. They are both decision-making tasks performed according to certain criteria.

The experimenter expectancy experiments and jury trials are similar in all essential respects. Where there are differences they are not essential and hence, would probably not alter the results of the analogy. Since the experimenter expectancy experiments and jury trials are analogous, it can be reasoned that the same expectancy effects found in the

experimenter expectancy experiments exist in criminal jury trials. An exhaustive review of the experimenter expectancy literature revealed that six major conditions need to be present if an expectancy effect is to occur in the experimental setting or by analogy in the criminal jury trial.

1.The task must be ambiguous in nature (e.g., witness decisions, application of the charge, and so forth).

2.The experimenter (judge) must have some expectancy (e.g., application of the law in the case, feelings about the attorneys, and so forth).

3.The expectancy cues must not be overpowering and blatant (e.g., the judge shouting at a witness, brow beating an attorney, and so forth).

4.The experimenter (judge) must appear important, businesslike, professional and personal.

5.The experimenter (judge) must communicate the expectancy through both auditory and visual channels.

6.The room (courtroom) must convey high status and appear in a worklike disorder.

The task ambiguity factor was studied primarily by Brightman who found that an ambiguous task must be present in order for the experimenter expectancy effects to occur. When a task with medium or little ambiguity was used the expectancy effects did not occur.[10]

The judge expectancy factor is an obvious one. If an expectancy is to be communicated through subtle nonverbal means, some sort of expectancy must exist in the first place. It would be most difficult for a judge, who presides at many bench trials, to have no feelings about any part of a case that the judge is hearing before a jury. Since subtle cues

can produce the expectancy effects the judge's expectancy probably doesn't need to be intense.

The third factor, that the cues must be subtle and not blatant or overpowering stems largely from subject set experiments. Rosenthal, Persinger, Vikan-Kline and Fode found that when subjects were given a "see through set," the subjects rarely rendered the desired responses.[11] Reasearch by Todd in 1975 found that deliberate nonverbal attempts to influence were negatively reinforcing.[12] This research is supported by the businesslike and professional requirement. If the judge becomes so blatant as to appear unprofessional the effect deminishes.

The factor of businesslike and professional appearance comes from a number of studies conducted by Rosenthal and others. Rosenthal found that a lack of professional and businesslike appearance by the experimenter resulted in a sharp reduction in the the experimenter expectancy effects.[13]

The fifth factor is the requirement that the expectancy cues use both auditory and visual channels. Studies by Rosenthal and Fode, Herzog, Rosenthal et al., and Burkhark all seemed to indicate that visual or auditory channels were not generally sufficient to create large expectancy effects. Both the auditory and visual channels had to be present.[14]

Finally, the room status factor flows from experiments conducted by Rosenthal and Haley. High status rooms that also have some degree of disorder led to greater expectancy effects.[15] Anyone who has seen a courtroom can attest to the

the obvious trappings of status and the seeming disorder as clerks, reporters, and bailiffs shuffle documents about.

These six factors represent a theoretical explanation of expectancy effects in the courtroom. These factors, derived from an analogy, can be viewed either as a series of hypotheses to be tested[16] or as a form or proof in and of themselves.

A Critique of Present Legal Methods

The legal community has responded to the threat of expectancy effects by using a battery of traditional legal remedies used to counteract verbal bias. Unfortunatly, these methods have not been based on any theoretical scheme of judge expectancy effects nor have they been geared to the nonverbal communication involved in expectancy effects. The techniques presently available to the legal community are ethical codes, curative instructions, mistrial, and appeal. These techniques cannot eliminate judge expectancy effects and in some cases may even make them possible.

Canon 3, parts A and C, of the Code of Judicial Conduct deals directly with the conduct of judges during trial. Canon 3A(3) states:

> A judge should be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, and others with whom he deals in his official capacity, and should require similar conduct of lawyers, and of his staff, court officials, and others subject to his direction and control.[18]

It is clear from this code that the legal community desires

to have judges refrain from excessive misbehavior. It is unclear exactly what degree of misbehavior violates this canon. At best, the canon serves as a loose guide for the trial judge to follow.

Even if canon 3A(3) is successful, it probably does little to decrease the judge's influence on the jury. The reverse is probably true. According to the expectancy effect analogy, the increase in the professional and businesslike demeanor of the judge is one of the conditions necessary for the expectancy effect. A note to 3A(3) even suggests that a judge can maintain this professional demeanor and still be "businesslike."[1] The judge in following the code provides the foundations for the very expectancy effects that the code was designed partly to eliminate. This is not to say that professional appearing judges are not desireable for other reasons, but simply that the professional standards, if followed, probably increase subtle expectancy effects rather than reduce them.

The second remedy available to the courts is curative instructions. These instructions can either take the form of a general admonishment in the final charge or admonishments directly after the behavior occurred.

The Federal Rules of Criminal Procedure state that, "[a]t the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests."[20] The defense counsel

can specifically request that the jury be instructed that they are the ultimate triers of fact in the case. These types of instructions are also used as a cure on the state level.[21] However, if these charges are inadequate the defense counsel must object before the jury begins deliberations or stand a slim chance of further appeal.[22]

Final curative instructions are unlikely to reduce or eliminate expectancy effects. The first problem with final curative charges is the place in which they occur. In the experimenter expectancy studies, expectancy effects were found throughout the experiments.[23] It seems reasonable to conclude that the same thing might happen in jury trials. The expectancy effect concerning the accuracy of a key piece of testimony or the soundness of a major argument may be more important than a general expectancy of guilt or innocence throughout the trial. Once the jurors have the expectancy locked in their minds, it would be most difficult for them mentally to go back over the entire trial and remember where the judge reacted to certain testimony or arguments. When the judge's cues are very subtle, it may be impossible for the jurors to remember the judge's cues.

Secondly, once jurors have been exposed to prejudicial material, any charge may not be able to remove the bias from their thinking processes. Many trial attorney's have compared the task to unringing a bell, once the clapper has struck iron. Although there has been no social science research dealing with the effects of instructions on judge expectancy effects, there has been research conducted concerning

other types of bias. Some studies have shown that jurors do not heed the instructions.[24] Other studies have shown that when there are tangible sources of bias, such as race, appearance, and so forth, the jurors "bend over backwards" and tremendously overcompenstate for the perceived bias.[25]

The third criticism of the final curative charge is based on the expectancy analogy itself. If a judge has been exhibiting subtle expectancies during the trial, it would seem odd for the judge to tell the jury to ignore any feelings that the judge exhibited concerning the case. The judge may routinely make the charge on the request of the defense counsel, but the judge may not believe that his/her subtle behaviors influenced the jury. It is plausible that the judge, by means of subtle nonverbal cues, may create the impression that the part of the charge concerning the judge's behavior is not very important.

The final criticism of the curative charge is that it creates message conflict. When a judge exhibits certain subtle nonverbal cues of his/her expectations of the jurors and then contradicts them, the jurors may ignore the verbal instruction. "Given the proclivity of individuals to rely more heavily on the nonverbal messages in such a situation, it is likely that the instruction will be ineffective."[26]

The attorney might also seek an admonition to the jury directly after the offending action. A quick admonition to

disregard certain comments has long been held as an appropriate response of the court.[27]

Although an attorney can easily make an objection and demand an admonition concerning blatant judge misconduct, several problems impede its use. First, the attorney, embroiled in the heat of the trial, might not even notice the subtle nonverbal behavior of the judge. Indeed, the attorney has other things on his/her mind.

Secondly, practical problems with objections to nonverbal behavior have been noted by a number of courts. Justice Shinn of California commented on the attorney's tactical problems.

> We do not believe it would have been in the best interests of his client to interpose continuous objections or otherwise express disapproval or criticism of the court's actions and thus run the risk of incurring the disfavor of the jurors, and perhaps the court. We do not doubt that. . . to insist that the court desist from its procedure would have been a tactical mistake.[28]

A quick instruction to the jury to disregard certain behaviors is not practical in all situations. Where subtle nonverbal behavior is at issue, it would be nearly impossible for an attorney to recognize and make an objection to each subtle cue.

Curative instructions probably have little if any effect on subtle nonverbal expectancy effects. There are often tactical problems for attorneys in requesting them, and their power to erase prejudice from the minds of the jurors has never been established by any social science research. The instructions about the judge, given by the judge, represent an expectancy problem in their own right.

A third remedy for expectancy effects is mistrial. Where the ends of justice would not be served by a continuation of the trial, the defense counsel may move for a mistrial. The trial judge must then rule on whether or not his/her nonverbal behavior was so prejudicial as to infect totally the trial.

The formal motion for a mistrial suffers from many of the same problems as curative instructions. In order for the judge to grant a mistrial, he must believe that his/her behavior was so biasing that a fair trial would be impossible. It seems unlikely that judges would declare a mistrial even if they engaged in blatant misbehavior. When subtle nonverbal behaviors are at issue, which the judge may have not been aware of, there is virtually no chance of the judge declaring a mistrial.

The final legal remedy available is appeal. In order to appreciate the problems of the appeal process, some knowledge of the concepts of harmless error and plain error is required. Rule 52 of the Federal Rules of Criminal Procedure provides the distinction.

> (a)Harmless Error. Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.
> (b)Plain Error. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.[29]

The courts have generally held that where plain error existed in a trial, the failure of the defense counsel to object at the time did not preclude the appeal court from granting another trial.[30]

A review of appellate level cases concerning nonverbal judge behavior was made. Since 1936, one hundred and thirty two cases were appealed on the basis of judge nonverbal behavior.[31] The appeals were concerned with three types of behavior; the judge's treatment of the defendant and the defense counsel, the judge's treatment of witnesses, and the judge's behavior during jury charges.

The first problem in the appeallate process is the standards on which the courts must decide whether or not judge behavior was plain error. The courts have generally demanded noticeable and repeated behaviors by the judges before they would rule on the basis of plain error.

This process contradicts the expectancy analogy. In the expectancy analogy, the less professional and businesslike, and the more blatant the expectancy cues, the fewer expectancy effects occur. Thus, the appeal courts have been ignoring the subtle nonverbal cues that have the greatest effects and reversing the cases where blatant cues probably had caused no expectancy effects. As long as harmless error and plain error are defined in this way, the appeal courts can have no real impact on reducing expectancy effects.

The second problem in the appeal of expectancy cases is the difficulty of many appeal courts to decide what had happened by using only the "dry record." In the review of cases it was found that the appeal courts rarely have any accurate record of the nonverbal activities that went on at trial. Even where activities are described in the record, they are usually not the subtle activities which probably have

the greatest effect. Often, the courts have tried to recreate the nonverbal scene by reading the remarks which accompanied the nonverbal behavior. This method must be far from accurate, especially with regard to subtle expectancy cues. While the appeal process may work well for verbal bias it is poorly equipped for nonverbal expectancy cues.

The present legal remedies of ethical codes, curative instructions, mistrial, and appeal are unlikely to reduce or eliminate expectancy effects. Innovations based on the theoretical explanations generated through the analogy offer the best chance of reducing judge expectancy effects.

Some Novel Proposals to Reduce Judge Expectancy Effects

The best method for reducing possible judge nonverbal expectancy effects would be to reduce, in the trial, one of the six factors which, according to the analogy, are necessary to produce judge expectancy effects. Three techniques might reduce judge expectancy effects by reducing one of the six factors developed from the analogy. These techniques are process instructions, juror training, and instructions presented by someone other than the trial judge.

Most states require that the judge instruct the jury on the law before they retire for deliberations. Often these instructions are so long and complex that they resemble a "thirty-minute lecture by the judge."[32] There might be a great

deal of confusion in the jurors' minds when they have to apply all of the standards contained in the charge to the testimony in the trial. This confusion might create the ambiguity that, according to the analogy, is a major factor in expectancy effects.

One method that might reduce the ambiguous nature of the charge is process instructions. Process instructions were first used in a criminal case in May 1977 by Judge David U. Strawn of the 18th Judicial Circuit of Florida. The process instructions were a series of questions about the case that the jury was required to answer. "If any one question was answered contrary to the charges, the state had not proven its case."[33]

Process instructions would present the jury with an orderly task. This might serve to reduce the ambiguity and, hence, probably reduce judge expectancy effects.

> . . . [T]he instuctions approach the jury's job in an orderly fashion. The present instructions give the jury a definition in legalistic terms and then the jury has to determine whether or not that definition has been met. It seems preferable to let lawyers who understand the law, break it down into its component parts then ask the questions that would have to be asked by any lawyer in an initial conference with a client to determine what legal niche it fits into, and then make a decision about whether or not the client has a case worth litigating. In effect, that's what was done with the process instructions for jurors in this process.[34]

A second method, which also might reduce task ambiguity is juror training. If the jurors are given a specific orientation as to the procedure followed at trial, the basic crime or crimes that they will be required to decide upon, the role of the judge and the jury, the role of other officers

of the court, and so forth, there might be a reduction of the ambiguity at trial. These training orientations might be placed on videotape and shown to the jurors who would then decide a certain type of case. The tapes could be made in a central studio and reviewed by the legislatures, the bars, and the courts.

The strongest advantage of such a training program would be that it would allow the jurors to be familiar with the law concerning the specific type of case that they would hear before they become engrossed in testimony. Thus, to some degree, the jurors will know what to look for when they hear the testimony and the confusion and ambiguity might be reduced.

The third proposal to reduce possible judge expectancy effects is prohibiting the judge from reading the major charge to the jury. At the end of the trial jurors are given instructions about the law and must apply all of the testimony that they had heard to those instructions. In one securities fraud case, the Second Circuit Court of Appeals ruled that an eigth hour charge was proper. In the case there were "... nine defendants and fifty counts and the transcript approached ten thousand pages."[35] Not all cases are that complicated, but the time of instructions may be the place where the most confusion will occur in the minds of the jurors. According to the analogy, the judge might leak auditory and visual cues which would lead to expectancy effects.

The practice in the states concerning instructions differs sharply.[36] The federal courts have largely required that the instructions at least be given orally before the jury. If these practices could be modified by having the judge prepare the instructions, but not actually read them, the communication of expectancy might be reduced at a crucial point in the trial. This could be done in a number of ways.

First, a third person who was not involved in the trial could read the charges prepared by the judge. In this way the person would be less likely to have an opinion on the issues as developed at the trial.

Secondly, videotaped instructions might be used. There are always parts of the instructions which must be given in virtually every trial of the same type. These are often referred to as "boiler plate" instructions. For example, instructions which must often be repeated are the parts of the statute involved. The judge might videotape these instructions in a courthouse studio before the trial actually begins. The judge would then show the jury the appropriate videotapes. Although this would eliminate expectancy cues during the "boiler plate" instructions, the technique cannot deal with the special instructions requested by the attorneys after the trial begins.[37]

Thirdly, the jury could be given only written instructions. Not only would written instructions eliminate the auditory and visual cues, but they might reduce ambiguity. A study by Buchanon, Pryor, Taylor, and Strawn has found that ". . . juror comprehension of the charges can be increased 13% simply by letting jurors read the instructions while the judge is

charging them."[38] There might be illiteracy in the jury box but this can be screened in the juror selection process.

These proposals might require statutory change in many instances. The advantages that might be gained from such proposals should be carefully considered. The need for such proposals is especially critical where the present legal remedies are unable to correct the problem. However, great care should be taken to make certain that these proposals do not compromise other legitimate ends of justice.

Conclusions

Experimenter expectancy effects pose a threat to the fair trial rights protected by our constitution. The threat is compounded by the inability of the present legal system to deal with the expectancy on the nonverbal level. It is therefore hoped that this paper will serve as a springboard for further research.

Two areas of study need extensive work. First, the expectancy effects and the factors isolated by the analogy need to be subjected to empirical scrutiny in a legal rather than a psychology setting. Secondly, the frequency with which these factors occur in actual trials should be determined.

For the empiricist the analogy represents hypotheses which need to be tested. This could be done in a number of

of ways, but the most promising would be a series of simulated jury experiments.

Experimental techniques could be used to test the effects of ambiguous situations, professional appearance, channels of communication, and soforth. A tedius discussion of all the possible methodologies would be out of place here, but there is no reason why the experiments found in the experimenter expectancy literature could not be modified to test judge expectancy effects. Although some special problems might appear in organizing the logistics of such a series of experiments, the present social science community seems well equipped to support or deny the hypotheses developed by means of the the analogy.

If the experimenter/judge expectancy analogy is tested and confirmed by experimental research, the extent of the problem in real trials should be determined. This could be done by observing judges and juries and questioning jurors after they have completed their trial duties.

Observers might use nonverbal scoring techniques to determine what types of behaviors are used by judges in real trials. Observation of the trial might also indicate how the jurors react to the judge's nonverbal cues, where their attention is focused, and their physical position as dictated by the design of the courtroom.

The second type of research might involve questionnaires and interviews. If permitted by the courts, these techniques might answer a number of questions. First, were the jurors involved in any ambiguous tasks? Secondly, did the jurors

notice any nonverbal cues from the judge, and if so, at what point in the trial? Thirdly, did the jurors think that the judge was attempting to manipulate them at any point during the trial? Fourthly, did the judge appear to the jurors as professional and businesslike? These questions might be easily answered and thus can give scholars some idea as to how often the conditions necessary for judge expectancy effects occur in real trials. The attempts to quantify these factors might also help to decide whether or not the proposals for reducing judge expectancy effects would be warranted by the number of cases in which the effects occur.

There are many injustices in this world that scream to be righted. Judge expectancy effects are so subtle that they largely go unnoticed. However, these effects could be undermining fundamental rights for thousands of Americans. Judge expectancy effects deserve further study.

Notes

[1] U.S.C.A. Const. Amend. 5-6, 14.

[2] Duncan v. Louisiana, 391 U.S. 145, 156 (S. Ct. 1968).

[3] Jack Weinstein and Margaret Berger, Weinstein's Evidence: Commentary on Rules of Evidence for the United States Courts and Magistrates, I (New York: Bender, 1977), p. 107-49.

[4] "Judges' Nonverbal Behavior in Jury Trials: A Threat to Judicial Impartiality," Virginia Law Review, 61 (1975), 1266-98.

[5] Donald Brightman and Beth Raymond, "The Effects of Task Ambiguity and Expectancy Control Groups on Experimenter Bias Effect," Journal of Social Psychology, 96 (1975), 277-87.

[6] Thomas v. State, 533 S.W.2d 796, 797 (Tex. 1976).

[7] For example see: Michael G. Rumsey, "Effects of Defendant Background and Remorse on Sentencing Judgments," Journal of Applied Social Psychology, 6 (1976), 1299-302; David G. Meyers and Martin F. Kaplan, "Group-Induced Polarization in Simulated Juries," Personality and Social Psychology Bulletin, 2 (1976), 64-8; James M. Gleason and Victor A. Harris, "Group Dimension and Defendant's Socio-Economic Status as Determinants of Judgments by Simulated Jurors," Journal of Applied Social Psychology, 6 (1976), 459-65.

[8] For example see: Robert Rosenthal and Kermit Fode, "Three Experiments in Experimenter Bias," Psychological Reports, 12 (1963), 491-514; Barry Burkhart, "Apprehenshion About Evaluation, Paralanguage Cues and the Experimenter-Bias Effect," Psychological Reports, 39 (1976), 15-23.

[9] For example see: Turner v. Louisiana, 379 U.S. 466 (S. Ct. 1965); Parker v. Gladden, 385 U.S. 363 (S. Ct. 1966).

[10] Donald Brightman, "Experimenter Bias as a Function of Task Ambiguity and Expectancy Controls," DAI, 34 (1974), 4623B (Hofstra); Brightman and Raymond, 277-87.

[11] Robert Rosenthal et al., "The Effect of Experimenter Outcome-Bias and Subject Set on Awareness in Verbal Conditioning Experiments," Journal of Verbal Learning and Verbal Behavior, 2 (1963), 275-83.

[12] Judy Todd, "Social Evaluation, Orientation, Task Orientation, and Deliberate Cueing in Experimenter Expectancy Effect," British Journal of Social and Clinical Psychology, 14 (1975), 27-31.

[13] Robert Rosenthal, Experimenter Effects in Behavioral Research (New York: Irvington, 1976), p. 258.

[14] For example see: Rosenthal and Fode, pp. 491-514; Martha J. Herzog, "Effects of Sex and Need to Avoid Success on the Verbal Mediation of Experimenter Bias," Diss., DAI, 34 (1973), 394B (Baylor); Burkhart, pp. 15-23; Robert Rosenthal et al., "Verbal Conditioning: Mediator of Experimenter Expectancy Effects," Psychological Reports, 14 (1964), 71-4.

[15] Rosenthal, Experimenter Effects, pp. 245-49.

[16] Rosenthal believes that analogies are one of the best ways to develop hypotheses. See: Robert Rosenthal and Ralph Rosnow, Primer of Methods for the Behavioral Sciences (New York: Wiley, 1975), p. 7.

[17] Perelman believes that analogies are indeed an element of proof. See: Ch. Perelman and L. Olbrechts-Tyleca, The New Rhetoric: A Treatise on Argumentation, trans. by John Wilkinson and Purcell Weaver (Notre Dame: Univ. Notre Dame Press, 1969), p. 386.

[18] Secial Committee on Standards of Judicial Conduct, American Bar Association, Code of Judicial Conduct (Chicago: n.p., 1972), p. 10.

[19] Code of Judicial Conduct, p. 10.

[20] Federal Rules: Criminal Procedures, 1975 ed. (St. Paul: West, 1975), p. 67.

[21] For example see: People v. Jones, 205 N.W.2d 611 (Mich. App. 1972).

[22] Federal Rules: Criminal Procedure, p. 67.

[23] Rosenthal, "Verbal Conditioning," pp. 71-4.

[24] For example see: Stanley Sue et al., "Effects of Inadmissible Evidence on the Decisions of Simulated Jurors: A Moral Dilemma," Journal of Applied Social Psychology, 3 (1973), 345-53.

[25] For example see: Ronald Friend and Michael Vinson, "Leaning Over Backwards: Juror's Responses to Defendants' Attractiveness," Journal of Communication, 24 (1974), 124-9.

[26] Virginia Law Review, p. 1283.

[27] For example see: People v. Galuppo, 185 P.2d 335 (Cal. App. 1947).

[28] People v. Robinson, 4 Cal. Rptr. 50, 71-2 (Cal. App. 1960).

[29] Federal Rules: Criminal Procedure, p. 95.

[30] For example see: Braswell v. United States, 200 F.2d 597 (5 C.A. 1952).

[31] The search was conducted using West's Decennial and General Digests. The total number of appeal cases is necessarily affected by the reluctance of attorneys to appeal cases on nonverbal grounds (most appeals fail) and the tactic of appealing a case on several different issues. Therefore a breakdown of these cases on the basis of win/loss, type of behavior, degree of behavior and so forth would be meaningless.

[32] K. Phillip Taylor et al., "Communication in the Courtroom: The Effect of Process Instructions on Jury Deliberation," Paper presented at the convention of the Southern Speech Communication Association, Atlanta, Georgia, April 1978, p. 9.

[33] Taylor, p. 2.

[34] Taylor, p. 13.

[35] U.S. v. Crosby, 294 F.2d 928, 943 (2 C.A. 1961).

[36] See: Lester B. Orfield, Criminal Procedure Under the Federal Rules, V (Rochester: Lawyers, 1967), p. 15.

[37] See: Orfield, V, pp. 55-56.

[38] Raymond W. Buchanan et al., "Legal Communication: An Investigation of Juror Comprehension of Pattern Instructions," Paper presented at the convention of the International Communication Association, Portland, Oregon, April 1976, p. 12.